IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Khem Raj vs. Bhoora Lal & ors.

S.B. Civil Second Appeal No.128/1986 against the judgment and decree dated 5.4.1986 passed by the learned Addl. District Judge, Rajsamand in Civil Appeal No.64/1980.

Date of Judgment: April 03, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Manish Shishodia , for the appellant.
Mr. B.N. Kalla, for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the judgment and decree of the trial court dated 19.1.1979 by which the trial court decreed the suit for possession of the plaintiffs against the defendants and the said decree was upheld by the first appellate court by judgment and decree dated 5.4.1986.

Brief facts of the case are that three plaintiffs Bhoora Lal s/o Udai Ram, Naru s/o Udai Ram and Gopi s/o Udai Ram filed the suit for possession of the property described in para no.1 of the plaint against the defendants Ganga Ram and Khem Raj. According to the plaintiffs, the suit property was belonging to the plaintiffs and plaintiff no.1 mortgaged half share to Ganesh Lal, Khem Ram and Kanak Mal Mahajan

for Rs.275/-. The plaintiff nos.2 and 3 mortgaged their share to Khem Ram and Kanak Mal for Rs.60/-. The mortgage was usufruct mortgage. The mortgagee in possession invested Rs.150/- over the property which was mortgaged by plaintiff no.2, therefore, the charge over the property against plaintiff nos.2 and 3 was Rs.210/-. The plaintiffs got the mortgage re-deemed through defendant no.1, as defendant no.1 paid the mortgage loan amount to said mortgagees in possession. The plaintiffs thereafter mortgaged the property in dispute with defendant no.1 for consideration of Rs.900/-. It is stated that defendants got the deed written in their book and got sign of the plaintiffs also. Since the mortgage was not registered, therefore, it remained incomplete and the suit for redemption of the property was not maintainable, therefore, the plaintiffs filed suit for possession of the suit property on the basis of their prior possession and sought possession of the property from the persons who are occupying the suit premises because of the permission granted by the plaintiffs. The plaintiffs prayed that since there is a charge of Rs.900/- over the property, therefore, the plaintiffs are ready to pay Rs.900/- to the defendants before taking possession.

The defendants submitted written statement and denied the title of the plaintiffs to the property in dispute. The defendants also denied the earlier mortgages. The defendants submitted that actual owners of the property were Darjan Singh and Mog Singh. The defendants purchased the suit property from said Darjan Singh and Mog Singh. The defendants further stated that in fact the plaintiffs themselves were in

possession of the suit property because of permission of the defendants to the plaintiffs to occupy the house. By this, the defendants admitted the possession of the plaintiffs but with plea that the defendants are not in permissive possession but the plaintiffs were in permissive possession. The defendants further submitted that the plaintiffs to take undue advantage, gave suit property to Ganesh Lal, Khem Ram and Kanak Mal Mahajan. The defendants persuaded said Ganesh Lal, Khem Ram and Kanak Mal Mahajan to vacate the suit house but they avoided to vacate it. However, according to the defendants, the possession of the suit property was delivered to the defendants in Samvat Year 2024 by Ganesh Lal, Khem Ram and Kanak Mal Mahajan. It is also stated that defendants jointly gave Rs.500/- to Bhanwar Singh in presence of large number of villagers and the plaintiffs declared that they shall not have any title in the property.

The trial court framed issues and thereafter held that the mortgage deeds are not admissible in evidence for the purpose of proving the mortgage. The trial court also held that the plaintiffs fully proved the permissive possession of the defendants and the defendants admitted prior possession of the plaintiffs, therefore, the plaintiffs are entitled for decree of the possession of the suit property. Since the plaintiffs admitted that there is a charge of Rs.900/- over the property in dispute, therefore, the trial court directed the plaintiffs to pay Rs.900/- to the defendants.

The judgment and decree of the trial court dated 19.1.1979 was

challenged by Khem Raj,one of the defendants and not by Gaga Ram. In the appeal, the appellant-defendant Khem Raj challenged the judgment and decree of the trial court and also took a plea that during pendency of the suit Ganga Ram died and the legal representatives were not brought on record, therefore, the suit already abated. However, it appears from the judgment of the first appellate court that no such argument was raised or pressed before the first appellate court by defendant present appellant Khem Raj. The first appellate court also was of the view that the plaintiffs are entitled for decree of the possession of the suit property and the defendants are entitled to Rs.900/- but on different reason and the appellate court also upheld the finding of the trial court about permissive possession of the defendants.

Being aggrieved against the judgment and decree of the appellate court dated 5.4.1986, appellant-defendant Khem Raj preferred this appeal.

Following substantial questions of law were framed by this Court while admitting the appeal on 7.10.1987:

> *"(1) Whether the learned lower court is right in granting a decree for possession on payment of or deposit of a sum of Rs.900/- in this suit for redemption, when the learned lower courts have found that the basis of the suit i.e. Mortgage set up by the plaintiff has not been proved ?*
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> *(2) Whether the learned lower court has erred in law in not appreciating that because of the death of defendant no.1 Shri Ganga Ram and on the plaintiff's failure to bring the legal representatives on record, no*

decree could have been passed and the decree passed against late Shri Ganga Ram a nullity ?"

It is submitted by the learned counsel for the appellant that the plaintiffs themselves admitted the mortgage and admitted the defendants to be mortgagees in possession. The two courts below concurrently held that the mortgage has not been proved for want of registered document, therefore, the trial court committed error of law for decreeing the suit of the plaintiffs for possession of the mortgaged property, if the case of the plaintiffs is accepted as true. Another ground of challenge is that since Ganga Ram died during pendency of the suit, therefore, the decree was made against a dead person and, therefore, the decree is nullity. In fact the suit abated before it was decreed.

The learned counsel for the respondents submitted that the plaintiffs were fully conscious that they cannot enforce any of the terms and conditions of the mortgage deed as the mortgage deed was not registered one and, therefore, the plaintiffs had only right to file suit for possession and they without hiding anything, filed the suit for possession alone. The defendants admitted plaintiffs' possession unequivocally and failed to prove that the possession of the plaintiffs over the property in dispute was permissive possession, on permission of the defendants. It is also submitted that the defendants' pleadings in the written statement are so vague that no meaning can be found out from the defence of the defendants. The defendants in their written statement even admitted that the plaintiffs were not only in possession but they handed over

possession to Ganesh Lal, Khem Ram and Kanak Mal Mahajan. The plaintiffs' case is also that the property was in possession of the above said persons as it was mortgaged with them. Therefore, in fact case of the plaintiffs that the suit property remained in possession of mortgagees of the plaintiffs also stands admitted. In these circumstances, the court below rightly decreed the suit for possession.

The learned counsel for the respondents, however submitted that there is no material available on record that Ganga Ram died during pendency of the suit. It is also submitted that in fact the first appeal filed by the appellant itself was not maintainable because of the reason that Ganga Ram was not impleaded in the first appeal and if the plea taken by the appellant-defendant Khem Raj is accepted then Ganga Ram's legal representatives were not impleaded as party in the first appeal. The ground taken by the appellant appears to be false one, therefore, the appellant did not press this ground even before the first appellate court which is apparent from the judgment of the first appellate court. No review petition has been filed by the present appellant before the first appellate court if the argument was pressed by the appellant and was not considered by the first appellate court, therefore, the appellant straight way cannot raise any ground in second appeal which was the ground pressed before the first appellate court.

I considered the submissions of the learned counsel for the parties and perused the record also.

So far as finding of the two courts below that the plaintiff were in

possession of the suit property, is based on evidence as well as on admission made by defendant no.1 in the written statement and as per his own evidence. The defendants' admission in the written statement that plaintiffs gave possession of the suit property to Ganesh Lal, Khem Ram and Kanak Mal Mahajan is unequivocal. The defendants failed to prove their title to the property. The defendants failed to prove any permission by which the plaintiffs occupied the house in dispute. In these circumstances, if the courts below decreed the suit of the plaintiffs for possession on the basis of prior possession and in view of the admissions of the defendants, the courts below have not committed any error of fact or law. The substantial question no.1 is, therefore, decided against the appellant.

So far as the appellant's plea that Ganga Ram died during pendency of the suit is concerned, that ground was taken in the memo of appeal but said ground was not pressed before the first appellate court. Not only this, the appellant did not choose to implead the legal representatives of Ganga Ram in the appeal before first appellate court if Ganga Ram died during pendency of the suit. Thereafter, the appellant did not press this point while arguing the appeal and this fact is apparent from the judgment of the first appellate court. Except plea taken by defendant-appellant in memo of appeal, there is no material available on record on the basis of which it can be held that Ganga Ram died during pendency of the suit. Even said issue could not have been decided by the first appellate court without impleading legal

representatives of Ganga Ram. Therefore, the appellant now cannot raise this ground in second appeal and there is no reason to hold an enquiry when said Ganga Ram died. If the decree has been passed against a dead person, death will have its own effect over the decree but the judgment and decree of the two courts below cannot be set aside on assumption that Ganga Ram died during the pendency of the suit. In view of the above, substantial question no.2 is also decided against the appellant.

In view of the above discussion, the appeal of the appellant is dismissed.

(**PRAKASH TATIA),J.**

mlt.